No. 89-1661

In The

Supreme Court of the United States

October Term, 1989

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AND CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,

Petitioners,

v.

MESA VERDE CONSTRUCTION CO.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK R. THIERMAN*
JOHN W. PRAGER, JR.
ROBERT FRIED
THIERMAN, COOK, BROWN & PRAGER
601 California Street,
17th Floor
San Francisco, CA 94108-2822
(415) 391-9200

Attorneys for Respondent,
Mesa Verde Construction Co.
*Counsel of Record

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit erred in refusing to retroactively apply the decision of the National Labor Relations Board in *John R. Deklewa and Sons*, 282 NLRB No. 184 (1987) contrary to the Board's determination and contrary to the determination of the other Circuits which have considered the question?

2. Whether the decision of the Court below creates an irreconcilable conflict between the National Labor Relations Board and the courts over employee representation issues normally within the expertise and exclusive jurisdiction of the National Labor Relations Board?

LIST OF PARTIES

The parties to the proceedings below and before the Court are:

1. Northern California District Council of Laborers;

2. Carpenters 46 Northern California Counties Conference Board;

3. Mesa Verde Construction Co.

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OPINIONS BELOW

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit after remand from the *en banc* Court (Pet. App. A) is reported at 885 F.2d 594. The Opinion of the *en banc* Court (Pet. App. B) filed November 15, 1988 is reported at 861 F.2d 1124. The Opinion of the original three-judge panel of the United States Court of Appeals for the Ninth Circuit (Pet. App. C) filed June 23, 1987 is reported at 820 F.2d 1006. The Decision of the United States District Court for the

Northern District of California (Pet. App. D) filed December 13, 1984 is reported at 598 F. Supp. 1092. The Order of the United States District Court for the Northern District of California denying the Motion for Alteration, Amendment or Vacation of Order (Pet. App. E) filed February 11, 1985 is reported at 602 F. Supp. 327.

JURISDICTION

The Judgment and Opinion of the original three-judge panel of the United States Court of Appeals for the Ninth Circuit was entered on June 23, 1987. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was filed and granted. The Decision of the *en banc* Court reversing the earlier Opinion and remanding the case to the three-judge panel to determine the question of retroactivity was filed on November 15, 1988. The Decision of the three-judge panel after remand was filed on September 13, 1989. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was filed on September 27, 1989. On January 26, 1990, the Petition for Rehearing was denied, and the Suggestion for Rehearing *en banc* was rejected, and the Order of the three-judge panel was amended.

The jurisdiction of the Court has been invoked under 28 U.S.C. § 1254(1). The Petition was timely filed with the Court under 28 U.S.C. § 2101(c), and this Response is filed pursuant to the Request of the Court.

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Section 8(f), 29 U.S.C. § 158(f).

B. Labor-Management Relations Act of 1947, as amended, Section 301, 29 U.S.C. § 185.

Pertinent portions of these statutory provisions are reproduced at Pet. App. F.

STATEMENT OF THE CASE

The Northern California District Council of Laborers ("Laborers") and the Carpenters 46 Northern California Counties Conference Board ("Carpenters") are labor organizations within the meaning of the National Labor Relations Act of 1947, as amended (hereinafter "NLRA"), 29 U.S.C. § 152(d). Mesa Verde Construction Company ("Mesa Verde") is an employer primarily engaged in the construction industry within the meaning of § 8(f) of the NLRA, 29 U.S.C. § 158(f).

In 1979, Mesa Verde entered into its first collective bargaining agreement with the Laborers, and signed an additional collective bargaining agreement with the Laborers on June 26, 1980. On November 17, 1982, Mesa Verde and the Laborers agreed in writing that their 1980 contract would continue in effect until June 15, 1986.

Mesa Verde first entered into a collective bargaining agreement with the Carpenters in August, 1979. Through a subsequent agreement executed in June, 1980, Mesa

Verde accepted the new June 16, 1980 to June 15, 1983 Carpenters Master Agreement. On September 8, 1982, Mesa Verde and the Carpenters entered into an early extension of the agreement to June 15, 1986.

Despite the fact that the agreements with both unions were to remain in effect until June 15, 1986, Mesa Verde, by way of letters, informed the Unions of its intent to abrogate or repudiate its collective bargaining agreements in May of 1984. At the time, Mesa Verde was working on a project in Hercules, California, at which it employed members of both Unions.

In late May or early June of 1984, Mesa Verde began work on *another* project employing non-union workers.

Both unions filed grievances against Mesa Verde and requested arbitration over Mesa Verde's contractual obligations on the *new* project. Mesa Verde brought suit under Section 301 of the LMRA, 29 U.S.C. § 185, against both Unions seeking a declaratory judgment that it need not comply with the Agreements with respect to projects begun after its repudiation of the Agreements. The District Court stayed the arbitrations pending resolution of the declaratory judgment action and later granted Mesa Verde summary judgment against both Unions.

The District Court concluded that Mesa Verde was a "project by project" employer, and that neither Union had "majority" support in the relevant units, *i.e.* the new projects. The Court held that the collective bargaining agreements at issue were "pre-hire" agreements authorized by § 8(f) of the NLRA and that Mesa Verde's May, 1984 letters were sufficient to repudiate the Agreements.

REASONS FOR DENYING THE WRIT

Summary of Argument

Although the issues underlying Petitioner's argument are important in the administration of the day-to-day relationships between construction unions and construction employers, those issues are not of such importance as to warrant the review of the Court.

The decision of the court below correctly analyzed whether the "law-changing" decision of the National Labor Relations Board ("NLRB") should be applied retroactively to the factual situation present in this case. *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349 (1971). Its decision rested upon settled principles of law.

Although "the general rule of long-standing is that the law announced in [a] Court's decision controls the case at bar," see *e.g., St. Francis College v. Al-Khazraji,* 481 U.S. 604, 608, 107 S.Ct. 2022, 2025 (1987), the Court has recognized that this general rule is subject to exception where, *inter alia,* substantial inequitable results would occur. See, *e.g., Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349 (1971).

Mesa Verde recognizes that among the members of the Court, there may be differences of opinion as to the continued viability of the Court's civil retroactivity doctrine, *e.g., American Trucking Associations, Inc., et al. v. Smith,* 495 U.S. ___, ___ S.Ct. ___ (June 4, 1990), but respectfully suggests that under the reasoning of either the plurality or dissent in that case, the outcome of this case would be the same. Hence, review of the "retroactivity" issues presented by Petitioner is unnecessary.

In its attempt to convince the Court otherwise, Petitioner has mischaracterized certain facts, and overemphasized the impact of the decision of the court below. It does not create the parade of horribles that Petitioner has suggested.

Finally, this case *does not* present a situation where there is a clear conflict among the Circuits on the precise issues presented.

ARGUMENT

A. The Court Below Correctly Concluded That Retroactive Application Of The NLRB's "Law-Changing" Decision in *John R. Deklewa & Sons, Inc.* To The Parties In This Case Was Unwarranted.

The *Chevron Oil v. Huson* test to determine whether a decision should *not* be given retroactive effect – a test which apparently still commands support of the plurality of the Court – has three parts, which may be summarized as follows:

1. whether the "law-changing" decision is one of first impression, or overrules clear past precedent;

2. whether retrospective operation of the law-changing decision would further or retard the operation of the rule in question;

3. whether retrospective application of the rule will impose substantial inequitable results.

Application of these three factors to the situation here reveals the correctness of the decision of the court below.

First, the "repudiation" rule applicable to Section 8(f) pre-hire contracts, previously grounded in NLRB precedents, see *e.g., D'Angelo & Kahn, Inc.*, 248 NLRB 396 (1980), was clearly overruled by the NLRB in *John R. Deklewa & Sons, Inc.*, 282 NLRB No. 184 (1987). The Ninth Circuit, which itself had previously adopted the "repudiation" rule as the law in its Circuit, see *e.g., United Bhd. of Carpenters & Joiners Local 2247 v. Endicott Enters.*, 806 F.2d 918 (9th Cir. 1986), clearly "overruled" its own past precedents on this subject in its *en banc* decision below.

The pre-*Deklewa* law concerning a party's *ability* to repudiate a pre-hire agreement during its term was abundantly clear, even if the law as to all of the types of *methods* to accomplish it was not. The "law-changing" decision involved here – either the NLRB's decision, or that of the Ninth Circuit's *en banc* panel – overturned the clear past precedent as to the employer's *ability* to repudiate such agreements. Under the NLRB's holding in *Deklewa*, neither a union nor an employer has the *ability* to lawfully repudiate a pre-hire agreement during its unexpired term; the question of the proper *method* to accomplish such a repudiation has become irrelevant.

Second, retrospective operation of the new "non-repudiation" rule endorsed by the majority of the *en banc* Court below would not further "employee free choice" or "labor relations stability". The practical effect of retroactivity of the new "non-repudiation" rule of the NLRB and Ninth Circuit would be to judicially impose a collective-bargaining representative upon the "non-union" workers employed by Mesa Verde on the projects at issue (Pet. p.

4), thereby currently depriving them of any free choice as to a bargaining representative, and depriving them of the ability they may have had six years ago to renounce the Union as their representative through an NLRB election.

Moreover, contrary to Petitioner's suggestions (Pet. p. 7), "labor relations stability" is fostered, not retarded, when the parties to a collective-bargaining relationship – even one legitimated by Section 8(f) of the Act – enter into and live by the rules of such a relationship knowing their respective rights and obligations. Here, both the Unions and the Employer must be held to have known when they entered into their original relationship and subsequently lived by it that the pre-hire agreements were voluntary and voidable by either party. The Unions could not expect that such agreements were enforceable unless they became the majority bargaining representative at each new jobsite, *Dee Cee Floor Covering*, 232 NLRB 421 (1977), and the Employer must be held to have known that as long as the Union had "majority status", the Employer would not be permitted to ignore the agreement or the economic consequences of its voluntary execution. *NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459 (9th Cir. 1983).

Petitioner's stated fears of forum-shopping (Pet. p. 11) should not persuade the Court that a prospective application of the new rules will retard their operation. The issue is not whether the NLRB and the courts have different rules *today* for the parties to collective-bargaining relationships. Rather, the issue is whether a termination of the relationship, accomplished in full accord with the law at the time of the operative conduct, is to be

penalized by retroactive adoption of a new rule outlawing such termination. Nothing in the law would have prevented the Unions here from challenging Mesa Verde's repudiation of the collective-bargaining agreements in appropriate charges made to the NLRB in 1984 at the time of the operative conduct, or would have prevented the Unions from arguing to the NLRB that on the facts or the law, Mesa Verde had unlawfully terminated the collective-bargaining relationship. The Unions simply chose not to do so, and now complain that their failure to have done so should be remedied by retroactive application of rules which did not exist at the time. Petitioner's "forum shopping" fears are illusory ones, for all cases involving repudiation conduct after the date of the *Deklewa* decision will be governed by it, and only a few old situations will be governed by the prior rules.

As to the third prong of the *Chevron Oil* test – whether retrospective application of the rule will impose substantial inequitable results – the reliance interests of the parties clearly suggest that Mesa Verde, and other employers, who relied upon the fundamental principles of law developed under Section 8(f) and Section 8(a)(5) of the Act would be unfairly treated by retroactive application of a rule which not only changes their economic and administrative expectations, but also the length and character of their relationship with the Unions involved.

Here, the "grievances" of the Laborers and Carpenters deal with alleged violations of the collective-bargaining agreement which occurred *after*, not before, the repudiation of the agreement by Mesa Verde (Pet. App. 64a). The undisputed facts reveal that the Unions were not the freely-chosen majority bargaining representative

of the employees working at the construction projects begun *after* the May 8 and May 15 repudiations of the Carpenters and Laborers Agreements. (Pet. App. 84a, 100a)

The economic and administrative consequences of retroactive application of the new non-repudiation rule would be to impose upon Mesa Verde the financial burdens of labor costs not expected as to those projects, as well as the necessity to deal with the Unions as to all the "wages, hours and other terms and conditions of employment" of Mesa Verde's employees notwithstanding the "non-majority" status of those Unions. Retroactive application would likewise impose contractual arbitration clauses. A *voluntary* method of settling disputes – favored by the Court for precisely this reason – would become, with adroit judicial prestidigitation, *involuntary*.

This case was carried to judgment in the District Court on the basis of settled principles of law. Mesa Verde premised its repudiation conduct on rights grounded in applicable NLRB and Ninth Circuit precedent, see *Dee Cee Floor Covering, Inc., supra; NLRB v. Pacific Erectors, Inc., supra*. The case was litigated with the understanding of all concerned that the operative principles governing the parties conduct were clear.

The Court has recognized that the lower courts, when considering whether a "law-changing" decision should be applied retroactively, should look at the harsh and disruptive effects upon the litigants, and should be guided by the following principles: if the operative *conduct or events* occurred before the "law-changing" decision, a court should apply the law prevailing at the time

of the conduct; otherwise, the court should apply the new law. *American Trucking Associations, Inc. v. Smith, supra,* 495 U.S. at ___. Recognizing the reliance interests of the parties, that is what the Ninth Circuit has done in this case.

Mesa Verde's repudiation of the Laborers and Carpenters agreements occurred almost three years before the "law-changing" decision of the NLRB in *Deklewa*. Therefore, it was proper for the Ninth Circuit to affirm the District Court's entry of judgment which had applied the prior law to the conduct which occurred prior to the "law-changing" decision. This position is consistent with the Court's precedents in similar circumstances. See, *e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858 (1982) ("law-changing" decision not applied retroactively when to do so would have upset judgment entered prior to "law-changing" decision).

In sum, since the Ninth Circuit correctly evaluated the application of the *Chevron Oil* factors to this case, there is no overriding warrant for the Court to exercise its supervisory power and review the Ninth Circuit's analysis of the retroactivity issue.

B. There Is No Conflict In The Courts Of Appeals Which Warrants Resolution By The Court At This Time.

Petitioner suggests that the Ninth Circuit and the Third, Eighth and Seventh Circuits are in conflict as to whether the NLRB's decision in *Deklewa* should be applied retroactively. Although it is true that the Third, Eighth, and Seventh Circuits have seen fit to defer to the

NLRB's conclusion that the new non-repudiation rules should apply retroactively to pending NLRB cases, see, *Ironworkers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988); *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989); *NLRB v. Bufco Corp.*, ___ F.2d ___ (7th Cir. 1990), no Circuit Court is in conflict with the Ninth Circuit on the application of such a rule in cases arising under Section 301 of the LMRA, 29 U.S.C. § 185.

Whatever may be said of the correctness of the non-repudiation rule adopted by the NLRB in *Deklewa*, the "law changing" decision of the NLRB was premised upon administrative convenience to overcome the NLRB's perceptions of the evidentiary problems in litigation of unfair labor practices. The NLRB's unfair labor practice decisions do not always formulate the rules for the enforcement of collective-bargaining agreements under Section 301. Indeed, that dichotomy was foreseen by the Court in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753 (1983). There, the Court concluded that although a Section 8(f) pre-hire agreement may form the basis of a breach of contract claim under Section 301 even if the Union does not represent a "majority" of the employees in the relevant unit, such a contract does not obligate the employer to "bargain" with the Union under penalty of an unfair labor practice. *Jim McNeff, Inc. v. Todd, supra; John R. Deklewa and Sons, Inc., supra.*

It would not be improper to have as a matter of federal labor policy a divergence in the law under different Sections of the Labor Act concerning the enforceability of pre-hire agreements. Since the unfair labor practice Sections of the Act, and Section 301 serve different purposes, *Jim McNeff, Inc. v. Todd, supra*, it is not necessary for the Court to fashion rules so as to create

identical results under them. Given such, it is not necessary for the Court to review the "retroactivity" analysis of the Ninth Circuit here simply to attempt to square the results in the two different lines of cases – unfair labor practices cases, and Section 301 breach of contract cases.

C. Even If The Court's Civil Retroactivity Doctrine Were To Be Applied Simply As A Remedial One, The Equitable Balance In This Case Tilts In Favor Of Upholding The Decision Below.

One of the functions of the Court is to construe statutes, determining the meaning of them as Congress intended. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). Although in reviewing an administrative agency's interpretation of the statute it is charged with enforcing, the Court may apply a deferential test of "reasonableness", the judiciary still is obligated to and does exercise its function with an eye on what Congress intended to be the law governing the rights and obligations of the parties regulated by those statutes. *Id.*

As Mesa Verde has set forth in its Cross-Petition For Writ of Certiorari, No. 89-1874, the Ninth Circuit's *en banc* decision here gave almost blind deference to an administrative agency which changed its mind about what rules were "workable" and about the proper Congressional intent behind two interrelated Sections of the Labor Act. Contrary to the Ninth Circuit, the question before it in this case was not whether the Court's decision in *McNeff* can be read as supporting the Board's decision in *Deklewa*, but rather whether the Labor Act's provisions themselves can support *Deklewa*. As Justice Scalia has

stated: "We defer to agencies, however (and thus apply a mere "reasonableness" standard of review) in their construction of their statutes, not of our opinions." *NLRB v. IBEW, Local 340*, ___ U.S. ___, 107 S.Ct. 2002, 2015 (1987) (Scalia, J., dissenting).

Even so, the extent that both the NLRB and the Ninth Circuit have appropriately changed the law in their respective jurisdictions so that now Mesa Verde's lawful repudiation of its pre-hire agreement would be unlawful, the question remains as to the remedy. If the dissent's view in *American Trucking Associations, Inc. v. Smith, supra,* is applied here, this new rule would be applied retroactively to the facts of this case, leaving it to the lower courts to determine the remedy to be enjoyed by the Unions. Here the suit was one for declaratory, not monetary, relief, so that a limitation on the scope of recovery would be inappropriate.

However, the reliance interests of the parties suggest that the Unions are entitled to no relief. The parties' relationship was governed by the applicable NLRB precedent, applicable Circuit Court precedent and the Court's decisions. The conduct of Mesa Verde in repudiating its Agreements with the Laborers and Carpenters was premised upon the intent of Congress that pre-hire agreements were to be "voluntary", *Jim McNeff, Inc. v. Todd, supra,* and the practical realities that minority Unions in the construction industry were treated differently by Congress when it enacted Section 8(f) in 1959. *Id.*

Principles of equity eschew reliance on rigid application of technical rules, and it is precisely for this reason

that the Court adopted its *Chevron Oil* retroactivity doctrine. Mesa Verde relied upon the law as it existed in 1984 to repudiate its contracts. The Unions chose not to challenge such conduct as an unfair labor practice, but chose to litigate the matter to judgment under that law. It seems unquestionable that the conduct of Mesa Verde, once lawful, cannot be made unlawful by changes in the law it had no hand in shaping, changes it could not have foreseen in light of the Court's decision in *McNeff*.

The Ninth Circuit correctly rejected rigid adherence to the new rule, and balanced the equities concluding that the Unions here were entitled to no relief, albeit doing so by application of the civil retroactivity principles of *Chevron Oil*. That equitable balancing in the form of viewing the matter as one of remedy results in the same conclusion.

Hence, assuming *arguendo* the correctness of the Ninth Circuit's deference to the NLRB and its adoption of *Deklewa* as the law of that Circuit, the outcome of this matter should have been, and should be that the Unions are not entitled to enforce the repudiated pre-hire agreement.

D. Should The Court Grant Review Of The Ninth Circuit's Retroactivity Decision, The Court Should Also Review The Underlying "Law-changing" Decision On Its Merits.

Although the retroactivity issues presented by Petitioner do not warrant review by the Court, Mesa Verde respectfully suggests that the Ninth Circuit has erred in not following the Court's decision in *Jim McNeff, Inc. v.*

Todd, supra. There, the Court clearly stated that Section 8(f) pre-hire agreements were voidable and capable of unilateral repudiation until the Union achieved majority status in the relevant unit, but were fully enforceable under Section 301 of the LMRA, 29 U.S.C. § 185, absent such repudiation. That the NLRB, an administrative agency, has concluded that such a rule is now "unworkable", or that the Ninth Circuit shares such a view, is no excuse for either to ignore the applicable precedent of the Court. As the Court stated only recently: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas, et al. v. Shearson/American Express, Inc.*, 490 U.S. ___, ___, 109 S.Ct. 1917, 1922 (1989).

The Court of Appeals below did not respect that admonition, which clearly was applicable here. It is for this reason that Mesa Verde has sought the Court's plenary review of the entire Section 8(f) – Section 8(a)(5) ruling of the NLRB in *Deklewa*. See, Cross-Petition for Writ of Certiorari, in No. 89-1874. Unless the Court either "overrules" its *McNeff* decision, or "overrules" the Ninth Circuit *en banc* decision here, litigants can not know whether their conduct past or future will expose them to Sec. 301 liability.

Mesa Verde suggests that the Court's decision in *McNeff* rested upon sound reasoning, and carefully balanced union-employer-employee rights in the construction industry. Respect for the principles of *stare decisis* suggests that the Court should not tamper with the rules

formulated in *McNeff*. Such principles also suggest that the Ninth Circuit's deferential adoption of the non-repudiation rule of *Deklewa* was unsound and contrary to law.

CONCLUSION

For all the foregoing reasons, Mesa Verde respectfully submits that this Petition for Writ of Certiorari should be denied.

However, should the Court believe that the issues herein warrant plenary review, Mesa Verde respectfully urges the Court to grant the Cross-Petition for Writ of Certiorari in No. 89-1784, and review the underlying questions of the correctness of the Ninth Circuit's *en banc* "law-changing" decision.

Respectfully submitted,

MARK R. THIERMAN*
JOHN W. PRAGER, JR.
ROBERT FRIED
THIERMAN, COOK, BROWN & PRAGER
601 California Street,
17th Floor
San Francisco, CA 94108-2822

Attorneys for Respondent,
Mesa Verde Construction Co.
**Counsel of Record*

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